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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FELD ENTERTAINMENT, INC., Plaintiff and Respondent, v. DENIZ BOLBOL, Defendant and Appellant.	H039543 (Santa Clara County Super. Ct. No. 1-12-CH004436)
FELD ENTERTAINMENT, INC., Plaintiff and Respondent, v. SHERISA ANDERSEN, Defendant and Appellant.	H039661 (Santa Clara County Super. Ct. No. 1-12-CH004435)
FELD ENTERTAINMENT, INC., Plaintiff and Respondent, v. JOSEPH CUVIELLO, Defendant and Appellant.	H039662 (Santa Clara County Super. Ct. No. 1-12-CH004437)

Appellants Deniz Bolbol, Sherisa Andersen, and Joseph Cuviello are animal activists who attended and attempted to document on video an "animal walk" held by respondent Feld Entertainment, Inc. (Feld) in Oakland in August 2012. Feld operates the Ringling Bros. Barnum and Bailey Circus (the circus). A week after the Oakland animal walk, Feld filed a petition seeking workplace violence restraining orders (WVROs) against appellants under Code of Civil Procedure section 527.8[1] based on allegations that the three of them had engaged in unlawful violence against Feld employees during the Oakland animal walk. Appellants filed a special motion to strike the petition under section 425.16. The court granted Feld's petition as to Bolbol only and denied appellants' motion to strike. The court also denied Bolbol's new trial motion.

Bolbol challenges the WVRO on the grounds that (1) Feld failed to prove that she engaged in unlawful violence, (2) Feld could not prevail because the events did not occur in a workplace, Feld was obstructing her constitutional rights and right of access to a public street when the events in question occurred, and Feld had unclean hands, (3) Feld failed to show that there was a likelihood of future violence, (4) newly discovered evidence entitled her to a new trial, and (5) the WVRO was unconstitutionally overbroad. Appellants contend that the court erred in denying their special motion to strike because Feld's petition arose from protected activity and Feld failed to show that it had a probability of prevailing. We conclude that the trial court did not err and affirm its order.

I. General Background

Bolbol, Andersen, and Cuviello are activists who seek to document and publicize the circus's treatment of animals. They do so by video-recording the animals used in the circus when the circus displays them in public, passing out leaflets at the venues at which

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[1] Subsequent statutory references are to the Code of Civil Procedure unless otherwise specified.

the circus performs, and educating the public about the circus's treatment of animals. In 2009, Bolbol and Cuviello obtained a five-year federal injunction against the operators of the San Jose arena to protect their "expressive activities" at the San Jose arena when the circus was staging performances there.[2] This injunction *excluded* protection on "public streets and sidewalks . . . which are legitimately and temporarily blocked off during transportation or movement of animals and equipment pursuant to concerns for the safety of the animals and their caretakers." Also in 2009, Bolbol and Cuviello settled a federal action they had brought against the City of Stockton and the operators of the Stockton arena and obtained a two-year injunction providing them with "full access to the public streets . . . without interference from [the City or the operators]." Feld was not restrained by either of these injunctions.

Feld brought its circus to Oakland in August 2012. An animal walk was held on the evening of August 7, 2012. During an animal walk, elephants and other large animals are walked from the train station to the venue where the circus is to perform. Appellants were present during the Oakland animal walk taking video of the elephants and the Feld employees accompanying them. The events in question in this case occurred during the August 7 animal walk in Oakland.

On August 14, 2012, Feld filed a petition for WVROs and sought and obtained temporary restraining orders (TROs) against Bolbol, Andersen, and Cuviello protecting Feld's employees. The TROs were supported by declarations from Feld employees David Bailey and Michael Stuart that Bolbol, Andersen, and Cuviello had pushed, shoved, and punched Feld employees during the August 7 animal walk. On August 15, appellants asked the court to dissolve the TROs because they infringed their

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[2] In November 2012, the federal court found that the temporary restraining orders involved in this case demonstrated that Feld, which had intervened in the federal action, "has adequate remedies to protect its rights" and denied Feld's motion to modify the federal injunction.

constitutional rights. The court found that there were no new facts and denied their request.

II. Evidence Presented At September 2012 Hearing

Feld's petition was heard over a two-week period commencing on September 4, 2012 and ending on September 18, 2012.[3] Both sides presented videorecordings and live testimony at the hearing. The court noted that "obviously, the [video]tapes [presented by both sides] will go into evidence as the best evidence."

Feld introduced two video exhibits containing excerpts from videos made by two Feld videographers during the August 7, 2012 animal walk. None of these videos was a complete video of the August 7 animal walk. Appellants introduced numerous videos and excerpts from videos of the August 7 animal walk. These videos included Andersen's video, Cuviello's video, and Bolbol's video of the August 7 animal walk. While some of these videos were a complete video of the August 7 animal walk from the perspective of the camera operator, none of them showed complete footage of the conduct of Andersen, Cuviello, or Bolbol. These videos were often dark, grainy, and out-of-focus.

Stuart, Feld's "[d]irector of circus operations," testified at the hearing. He explained that an "animal walk" is the movement of the elephants and horses from the train to the venue These walks are usually two to four miles long. "A lot of people" "come to watch" the animal walk. Feld uses the animal walks to publicize and promote

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[3] The TROs were reissued throughout these hearings. However, when the court continued the hearing to September 12, 2012, it modified the distance of the stay away order to 2 yards rather than 5 yards. The court explained to Feld that it "need[s] to give [the activists] enough space to be able to lawfully engage in their First Amendment protected area. So . . . if I make a 2-yard order, [Feld employees] have to give [the activists] 2 yards." "[Feld] employees cannot place [the activists] in a situation where they violate it. I mean, that's provocative."

the circus. Feld hired three videographers to record the August 7, 2012 animal walk. Feld employees hold rope lines during animal walks to "create a barrier" to "protect the animals" and "keep the public back . . . so we can walk in an orderly fashion . . . ." Feld had begun using rope lines four or five years before the August 2012 incident. The animal walk uses "the whole street" so that Feld can "keep everybody away from the animals as much as possible." Stuart, who had been present for more than 900 animal walks during his employment with Feld, had never seen an incident involving the animals. The animals are also walked between the animal compound and the venue during performances, but rope lines are not used for those very brief walks.

Stuart testified that Feld instructs its employees "not to interact with the protestors" unless they come into the street and then "just to ask them to move back off the street." Cuviello's video of the August 7, 2012 animal walk was shown to Stuart, and he described it as an accurate depiction of the events. Cuviello's video showed the elephants being escorted from the train station in Oakland to the Oakland arena. The event occurred at night, so the video quality is mostly poor. Feld employees hold rope lines on both sides of the elephants. Within the rope lines are the elephants and a large number of Feld employees. The animal "handlers" walk two or three feet from the animals. The sidewalk is within 15 feet of the handlers. Outside the rope lines are the protestors. At times, the Feld employees use the rope lines to further limit the narrow space available to the protestors, and there is an off-and-on contentious verbal battle between the Feld employees and the protestors.

Stuart testified that the Oakland 2012 animal walk was "one of the worst walks we've ever had" and that the commotion caused the elephants to "get agitated . . . ." Stuart testified that Andersen hit him in the back during the animal walk. He denied that he had stepped on her toe or pushed her into a fence. Stuart testified that he asked her if she hit him, and she said no. Stuart is six feet, five inches tall and weighs 270 pounds. He testified that he feared Andersen, an average-sized woman. Stuart testified that the

circus's subsequent appearance in San Jose, after the TROs issued, did not result in any violence perpetrated by the protestors. The protestors "always videotaped the walk." Stuart admitted that, at the venues, Feld would use trucks and vehicles to block the protestors from video-recording.

Bailey, Feld's assistant general manager for the circus, also testified at the hearing. He stated that Feld used animal walks "as a type of media event." Bailey testified that he saw both Cuviello and Bolbol "pushing and shoving" during the August 7, 2012 animal walk. Bolbol grabbed the rope and went underneath it. Bailey said that he saw an animal "react" to Bolbol's conduct, which caused him concern. The reaction in question was turning and looking. Bailey testified that Cuviello hit Feld employees Henry Higinio and Lorenzo Del Moral with his camera on a stick. Bailey also testified that he saw Andersen hit Stuart in the back. He further testified that Bolbol pushed him in the back to try to get him out of her way so she could go around him. Bailey testified that after the August 7 animal walk he saw Bolbol, during the Oakland performances, "demanding to be closer to the animals" and "creating an unsafe environment." Bailey testified that the Feld employees escorting the animals were not permitted to push the ropes against the protesters. However, these Feld employees were instructed "to push [the rope] to give as much room as necessary."

Widny Neves, another Feld employee, also testified at the hearing. She had helped with the rope lines during animal walks. The protesters "wanted not to be on the sidewalk," which posed a problem. She testified that Bolbol "elbowed me in my stomach" when Bolbol was going under the rope line during the August 7, 2012 animal walk. Neves, who was "very frightened" by this conduct, also testified that she saw Cuviello push her co-worker Higinio.

Feld employee Del Moral testified that he was a senior elephant handler. He had seen Bolbol and Cuviello become "more aggressive over the years," and they had begun "pushing up against the rope and up against the people." He testified that, during the

August 7, 2012 animal walk, he saw Bolbol "elbowing and pushing into the escorts." Del Moral testified that Bolbol had "[a] number of times" "grab[bed] the rope and tr[ied] to go under it." Cuviello had backed into Del Moral while Cuviello was walking backwards. Del Moral saw Cuviello trying to film over Higinio's head and "hitting him on the side and shoulder" with his camera pole. He also saw Andersen push or shove Neves and Carla De Abreu Voigt.

Voigt, another Feld employee, testified that she was one of the rope holders during the animal walk on August 7, 2012. While she was holding the rope, Bolbol pushed her "[m]aybe like five times" with her arm and shoulder and said "'don't harass me.'" Bolbol's actions scared Voigt and made her cry. Voigt testified that she saw Cuviello hit Higinio repeatedly with his camera.

A risk assessment expert testified on behalf of Feld that he had reviewed the videorecordings and determined that Bolbol, Cuviello, and Andersen posed "a significant escalating risk" to Feld's employees. However, he admitted that he did not consider who was causing the escalation. And he conceded that it was an "ebb-and-flow situation" that did not involve "steady escalation."

Bolbol testified at the hearing that her advocacy efforts consisted of holding up signs, passing out leaflets, and exposing the treatment of animals in circuses by video-recording the conditions and treatment of the animals. She described how, in her view, Feld was retaliating against her and harassing her for exposing the treatment of the elephants. Feld employees had a history of using the ropes against her and the other advocates. "They literally would wrap them around us" "on the sidewalk." Feld employees would also use the ropes to force the advocates into ditches or fences. In addition, Feld employees would block and destroy their cameras and spray them with fire hoses. Bolbol testified that it was "impossible to be in compliance with the TRO" because Feld had "between 300 and 400 employees" at the circus. "[I]t's impossible to

stay 15 feet away from everybody." She would not be able to video-record the animal walk while staying 15 feet away from every Feld employee.

During the August 7, 2012 animal walk, Bolbol observed that Feld for the first time had hired professional videographers to record the animal walk. Feld had 25 to 30 employees at the animal walk. She saw Higinio use his rope to hit Cuviello's camera pole. She also saw Cuviello pushing the rope away from him. Bolbol saw Del Moral "walk right into [Cuviello] and hit him." Bolbol saw Bailey video-recording her. Feld employees pushed the rope up against her and almost pushed her into a ditch. Bailey also used his body to shove her into a fence. Another Feld employee also pushed her into a fence. Bolbol saw Andersen hit Stuart in the back. Bolbol testified that she had tried to go under the rope twice.

Andersen testified that she was video-recording the August 7, 2012 animal walk. The escorts pushed the rope up against her body and her camera pole, which interfered with her filming. Stuart tried to block Andersen from proceeding. He stepped on her foot and used his hip to push her into a fence. Andersen hit Stuart to get him off of her foot. He asked her if she had hit him, and she said no because she was scared. In 2011, Bailey had tried to block her view so that she could not video-record the elephants and had tried to block her from continuing to walk down a sidewalk. Andersen had regularly encountered this kind of conduct by Feld employees.

Cuviello testified that he is part of an organization called "Humanity Through Education." He testified that he had never used violence against any Feld employees. However, Feld employees had continually harassed him and assaulted him with ropes. He had pushed the rope off of him during the August 7, 2012 animal walk when Higinio was holding it against him, but he had not hit Higinio. Cuviello had not hit anyone with his camera because he would not want to risk damaging his expensive camera. Cuviello was filming an interaction between Del Moral and Bolbol when Del Moral "slammed right into" Cuviello. Cuviello then pushed Del Moral off of him. In prior years, the Feld

employees had not been as "aggressive with the ropes" on Cuviello. His position was that he had "a right to be anywhere on that sidewalk . . . ."

III. Procedural Background

On September 12, 2012, after Feld had presented all of its evidence, appellants jointly filed a special motion to strike the petition under section 425.16 (the motion to strike). The court did not consider the constitutional issues raised by appellants at the September hearings, instead choosing to first "hear the evidence to determine whether there is any basis at all" for a restraining order before subsequently considering the constitutional issues.

At the conclusion of the evidentiary hearing on September 18, 2012, the court made its factual findings. The court did not find that there was factual support for a "course of conduct" theory. It denied the petition as to Andersen and Cuviello on the ground that there was "insufficient evidence" to support a WVRO as to them. Although Andersen had hit Stuart in the back when he was "blocking her way," the court found that this act was not an "act of violence" because Stuart "did bump into her" and "was stepping on her foot." "Her response was instinctive and does not form the basis for the issuance of an injunction." The court found that testimony about Andersen pushing Neves and Voigt "was not well fleshed out" and may have been "in response to normal jostling of the crowd." The court determined that the evidence as to Cuviello's acts was conflicting and not "clear and convincing" regarding the "Henry" (Higinio) incident. It credited Cuviello's "convincing" testimony with regard to the Del Moral incident.

However, the court found that Bolbol "did commit a battery against Feld employees." Since the court had "not addressed any constitutional issues," it extended the TRO as to only Bolbol through October 23, 2012 so that it could address the constitutional issues at that time. The court also continued the motion to strike to that date. The parties thereafter stipulated that the motion to strike and the First Amendment

issues concerning a permanent injunction would be heard in November 2012 and that the TRO against Bolbol would remain in effect until then. Bolbol subsequently filed a motion for a new trial, which the court viewed as a motion "to reopen the evidence," based on newly disclosed Feld videos of the August 7, 2012 animal walk. In November 2012, the parties agreed to continue the hearing on all of the remaining issues to January 2013, and the TRO against Bolbol was extended to January 14, 2013.

At the January 2013 hearing, the court entertained argument on Bolbol's constitutional objections, her new trial/reopen motion, and appellants' motion to strike, and it took all of these issues under submission. In an April 2013 order, the court overruled Bolbol's constitutional objections and issued a three-year WVRO against Bolbol that protected all of Feld's employees. This order precluded Bolbol from entering Feld's "workplace" and following any of its employees. She was required to stay at least two yards away from all Feld employees and Feld's workplace. The court found that its restraining order was "carefully tailored to protect [Bolbol's] constitutional rights while protecting the peace and safety of [Feld's] employees." The court also denied the motion to strike and Bolbol's new trial/reopen motion.

Andersen, Cuviello, and Bolbol timely filed notices of appeal from the court's order. Bolbol's request for a stay was denied by the superior court in August 2013 on the ground that the trial court lacked jurisdiction due to her April 2013 notice of appeal.

IV. Bolbol's Challenge to the Three-Year WVRO

Section 527.8 authorizes the issuance of WVROs. "Any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an injunction on behalf of the employee and, at the discretion of the court, any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer."

(§ 527.8, subd. (a).) "'Unlawful violence' is any assault or battery, or stalking as prohibited in Section 646.9 of the Penal Code, but shall not include lawful acts of self-defense or defense of others." (§ 527.8, subd. (b)(7).)

Bolbol claims that Feld failed to prove that she engaged in unlawful violence. She also claims that Feld could not obtain a WVRO because the events did not take place in Feld's workplace, Feld had "unclean hands," and there was no likelihood of future violence, and Bolbol also argues that the trial court erroneously failed to determine whether Feld was acting lawfully at the time of the events, that the trial court erred in denying her new trial motion, and that the WVRO was unconstitutionally overbroad.

A. Standard of Review

Bolbol contends that this court must review the record to determine whether it contains "clear and convincing evidence" supporting the trial court's findings. No case she cites supports her claim that this is a correct description of our standard of review.

In her opening brief, she cites *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71 (*CRI*). In *CRI*, the Court of Appeal was exercising *de novo review* in determining whether the plaintiff had presented clear and convincing evidence in opposition to an anti-SLAPP[4] motion. (*CRI*, at p. 79.) It does not advance her contention. In her reply brief, she claims that, "[w]hen faced with a sufficiency of the evidence contention, the appellate court must determine *whether the decision of the trier of fact was reasonable*."[5] (Italics added.) She cites *In re Angelia P.* (1981) 28 Cal.3d

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[4] "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Simpson Strong-Tie Company, Inc. v. Gore* (2010) 49 Cal.4th 12, 16, fn. 1.) Section 425.16 is the anti-SLAPP statute.

[5] Bolbol also argues for the first time in her reply brief that we should exercise de novo review because "normal principles of substantial evidence review do not apply to decisions implicating free speech." She did not make this argument in her opening brief. Appellate courts ordinarily do not consider new issues raised for the first time in an

908 (*Angelia*) as support for this proposition. *Angelia* was a dependency case raising a sufficiency of the evidence issue. The California Supreme Court relied on the well-established substantial evidence standard of review: whether the record " 'discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that *a reasonable trier of fact could find* [that termination of parental rights is appropriate based on clear and convincing evidence]. (*Angelia*, at p. 924, italics added.)

The California Supreme Court's delineation of the well-established substantial evidence standard of review confirms that this standard of review does not ask an appellate court to determine whether the factfinder's "decision" was "reasonable" or whether this court believes that the evidence in the record is "clear and convincing." It asks us to determine only whether *a reasonable factfinder could have determined* that the evidence in the record was clear and convincing. We do not determine whether the factfinder's *decision*, in our view, was *reasonable* or whether the evidence, in our view, is clear and convincing. We decide only whether a reasonable factfinder *could have so found*. While the factfinder's standard of proof (preponderance, clear and convincing, or beyond a reasonable doubt) plays a role in our review, its role is not what Bolbol envisions. We limit our review to whether any reasonable factfinder could have found that the evidence met the relevant standard of proof. The application of this standard of review does not involve an evaluation by this court of whether the evidence before the factfinder was, in our view, clear or convincing. Whether a particular universe of evidence amounts to *clear and convincing* proof of a fact is an inherently factual

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appellant's reply brief because such a tactic deprives the respondent of the opportunity to respond to the contention. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765.) It is only upon a showing of good cause for failing to raise the issues earlier that an appellate court will address issues that are initially raised in the reply brief. (*Ibid.*) Bolbol does not attempt to make such a showing. Hence, we disregard her attempt to raise a new issue in her reply brief.

determination that is committed to the factfinder. Our review is limited to a consideration of whether *any* reasonable factfinder could have made such a factual determination. "[W]e resolve all factual conflicts and questions of credibility in favor of the prevailing party, and draw all reasonable inferences in support of the trial court's findings." (*City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 538.) This is the standard of review that we apply in this case.

B. Unlawful Violence

Neves testified that Bolbol "elbowed me in my stomach" when Bolbol was going under the rope line, causing Neves to become "very frightened." Voigt testified that Bolbol pushed her "[m]aybe like five times" with her arm and shoulder, which scared Voigt and made her cry. The court noted that these events were not captured on any of the videos, but it based its findings on the testimony of Voigt and Neves, whom it found "credible." The trial court expressly found that Voigt had been "pushed or hit several times" by Bolbol, that Bolbol "committed a battery" on Voigt, and that Bolbol "did elbow" Neves.[6]

Bolbol claims that, despite the testimony of Voigt and Neves, the record does not contain substantial evidence that she assaulted Voigt or Neves because the videorecordings of the August 7, 2012 animal walk indisputably establish that she did not commit any unlawful violence on Voigt or Neves. She cites *Scott v. Harris* (2007) 550 U.S. 372 (*Scott*) as support for her claim that the videos must be credited over the testimony of Voigt and Neves. *Scott* is of no assistance to her. *Scott* was a qualified immunity case involving a motorist's flight from the police. The officer purposely made

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[6] The court found that, even if a rope was being pushed against Bolbol, "her response was disproportionate to the circumstances and, therefore, was not reasonable under the circumstances, nor did it constitute self-defense."

contact with the motorist's car to force him to stop. The motorist was seriously injured and sued the officer. (*Scott*, at pp. 374-375.) The officer moved for summary judgment based on qualified immunity. The district court found that there were material factual disputes precluding summary judgment, and the court of appeals affirmed. The United States Supreme Court disagreed. (*Scott*, at pp. 376-377.) It found that the motorist's version of the facts did not create a material factual dispute because there was a videorecording of the entire event that *indisputably contradicted* the motorist's version. (*Scott*, at pp. 378-380.) Hence, there was no "'genuine'" dispute of fact. (*Scott*, at p. 380.)

Bolbol contends that, as in *Scott*, the videos indisputably contradicted the testimony of Voigt and Neves, thereby precluding a factual finding based on their testimony. We disagree. The videos in this case are entirely unlike the video in *Scott*. None of the videos introduced below, including those presented in support of Bolbol's new trial motion, showed *Bolbol's conduct in its entirety* during the August 7, 2012 animal walk. None of the Feld videos focused on Bolbol's actions during the animal walk. One of Feld's videographers focused on Cuviello throughout the animal walk, while a second Feld videographer focused on another male.[7] Although the altercation involving Andersen was captured on one of the Feld videos, as was Cuviello's altercation with Feld employees, Bolbol's appearances in these lengthy videos were occasional and brief. Thus, these videos do not indisputably contradict the testimony of Voigt and Neves.[8]

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[7] These two Feld videos are designated "Clip 1 (Camera 1)" and "Clip 2 (Camera 2)." Clip 1 is about 12 and a half minutes long and focuses on a young man. Clip 2 is about 23 and a half minutes long and focuses on Cuviello. The video exhibits introduced by Feld at the September 2012 hearing were all excerpts from Clip 1 and Clip 2.

[8] The videos produced by appellants also did not contain a complete recording of Bolbol's conduct. Andersen's video showed what appeared to be the entirety of the animal walk from her perspective, but Bolbol was only rarely seen. Cuviello's video

Bolbol focuses on Neves's testimony that Bolbol elbowed Neves while Bolbol was going under the rope line and contends that the videos captured the only time Bolbol went under the rope in Neves's presence and therefore establish that no elbowing occurred on that occasion. The problem with this argument is that the videos, none of which follow either Bolbol or Neves throughout the animal walk, do not establish that the incident shown in the videos where Bolbol went under the rope in Neves's presence was the only such incident that occurred. Nor can we accept, as Bolbol argues, that the elbowing was not violence because it was part of Bolbol's attempt to go under the rope rather than a purposeful attempt to elbow Neves. The trial court, as the factfinder, was entitled to consider the entirety of Bolbol's conduct during the animal walk in deciding whether her elbowing of Neves was intentional. Some of Bolbol's physically aggressive actions were shown on the videos, and they supported the trial court's implied finding that her physical contact with Neves was not accidental.

As to Voigt, Bolbol insists that the videos demonstrate that she was only in Voigt's vicinity for four minutes during the animal walk and could not have done as Voigt claimed during that period of time. The videos do not demonstrate what she claims. Voigt and Bolbol appear intermittently during the various videos, but the videos do not indisputably establish that the events testified to by Voigt could not have occurred. Although Bolbol's brief purports to provide a detailed account of what is seen on the videos during that four-minute period, it ignores the gaps during which neither Voigt nor Bolbol can be seen during the four-minute period that Bolbol claims is the sole period they were in proximity to one another. Since neither of them is shown during these gaps or in much of the remainder of the videos, the trial court could have reasonably

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showed very little of Bolbol. Bolbol's video, which is incomplete, out-of-focus, and jumpy, does not show all of her actions.

concluded that the events to which Voigt testified occurred during those gaps or during other portions of the animal walk when neither of them was captured on video.

Since Bolbol's actions toward Voigt and Neves easily could have escaped being captured on video given the lack of focus on her by the videographers, the videos do not indisputably establish that the trial court erred in crediting the testimony of Voigt and Neves. Hence, the trial court was entitled to credit the testimony of Voigt and Neves, and their testimony supported the court's finding that Bolbol had engaged in unlawful violence by elbowing, pushing, and hitting them.

C. Workplace, Obstruction of Street, and Unclean Hands

Bolbol contends that Feld could not obtain a WVRO because it failed to show that the street and sidewalk where her unlawful violence against Feld employees occurred was Feld's "workplace." She claims that "Feld had the burden to establish that its obstruction of the street was lawful." In Bolbol's view, Feld's "obstruction of the street" was illegal, and therefore it had "unclean hands," which precluded it from obtaining equitable relief.[9]

Bolbol's argument appears to be that the location of the unlawful violence, a public street on which Feld employees were working during the animal walk, could not qualify as a "workplace" within the meaning of section 527.8. She cites no authority for her claim that section 527.8 precludes an employer from obtaining a WVRO if the unlawful violence occurred in a workplace that was a public place. The statute permits a

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[9] Bolbol makes what she denominates as a separate argument that Feld was required to prove that "it lawfully excluded Ms. Bolbol from the streets, sidewalk and walkways it claims as it[s] 'workplace' under section 527.8." The only authority she cites in support of this proposition are cases concerning the right of public access to public streets. We cannot see how this contention has any independent basis. Instead, it seems to be a mixture of her claim that Feld failed to establish that the unlawful violence occurred in its workplace and her claim that Feld had unclean hands. By addressing those claims individually, we eliminate the only bases for this mixed claim.

WVRO to be obtained if the "unlawful violence . . . *can reasonably be construed to be carried out or to have been carried out at the workplace* . . . ." (§ 527.8, subd. (a), italics added.) The statutory language describing the location of the unlawful violence is plainly intended to have a broad scope. If the location of the unlawful violence "can reasonably be construed" to be a workplace, the statute permits a WVRO to be obtained. Feld employees were required to perform their duties during animal walks, which necessarily took place in public since the animals had to be transported along public streets from the train station to the performance venue. During this transport, Feld employees shepherded the animals along these streets to ensure the safety of the animals and the public by precluding contact with the animals by the public. The trial court could readily conclude that the public streets through which the animal walk passed "can reasonably be construed" to be the workplace of the Feld employees performing their duties of shepherding the animals.

Just because unlawful violence against an employee occurred in a public place does not deprive the employer of the power to protect its employees from further unlawful violence by obtaining a WVRO. Were this not the case, unlawful violence at public workplaces, such as courthouses, parks, schools, and libraries, could never be the subject of a WVRO. The statute's explicitly broad language concerning the nature of the "workplace" indicates that the Legislature did not intend to preclude a WVRO from being issued to protect employees working in public places from workplace violence. Indeed, the Legislature explicitly specified that a WVRO may be obtained by a public employer. (§ 527.8, subd. (b)(3).) We reject Bolbol's contention that the trial court erred in finding that the location where the unlawful violence occurred could be "reasonably construed" to be Feld's workplace.

Bolbol claims that the trial court *failed to decide* whether Feld "was acting lawfully." Bolbol bases this assertion on the trial court's oral statement at the end of the September 18, 2012 hearing that it was not deciding whether Feld "was entitled or not

entitled to have that rope there." That oral statement does not support her assertion that the court failed to decide the legality of Feld's conduct. In the court's April 2013 written order, it explicitly found that the evidence *did not support* Bolbol's claims that Feld "acted outside its authority, *unlawfully*, or with 'unclean hands.'" (Italics added.) Hence, the court *did* decide that Feld was *not acting unlawfully*. "[O]ral opinions of the trial court may not be used to impeach the findings or judgment." (*Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1385.) Here, the court's initial failure to decide this issue was corrected in its final order. Thus, there is no basis for Bolbol's claim that the trial court failed to decide this issue.

Bolbol also challenges the validity of the trial court's finding that Feld was not acting unlawfully at the time of the unlawful violence and did not have unclean hands. She claims that Feld could not obtain an injunction because it was *acting unlawfully* by obstructing a public street when Bolbol's unlawful violence occurred. The trial court expressly found that the evidence did not support Bolbol's claims that Feld "acted outside its authority, unlawfully, or with 'unclean hands.'" Since the applicability of the doctrine of unclean hands is a question of fact (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978 (*Kendall-Jackson*)), we review this finding for substantial evidence. "Unless plaintiffs were guilty of unclean hands *as a matter of law* . . . , we cannot overturn the trial court's refusal to apply this affirmative defense to bar plaintiffs from injunctive relief." (*Committee to Save Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1268.) "Not every wrongful act constitutes unclean hands. But, the misconduct need not be a crime or an actionable tort. Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine." (*Kendall-Jackson*, at p. 979.)

Bolbol insists that Feld's conduct necessarily constituted "unclean hands" because it was unlawfully obstructing a public street and public sidewalks and walkways. She

maintains that Feld's use of ropes to obstruct free passage down the street and sidewalk was unlawful.[10] Whether Feld's use of the ropes was improper and in bad faith was a critical contested issue below. The videos of the animal walk demonstrate that, during most of the animal walk, Feld's use of the rope lines did not obstruct Bolbol and her fellow activists from freely proceeding along the sidewalk or the edge of the street as the animal walk progressed. At times, due to the narrowness of the road, the absence of a sidewalk or walkway, or other obstructions, Feld's rope lines appeared to temporarily or partially obstruct passage of the activists documenting the animal walk. The fact that their passage was briefly interrupted does not mean that the trial court was *obligated* to find that the doctrine of unclean hands precluded Feld from obtaining injunctive relief. The trial court could have concluded that these brief obstructions were not the type of wrongful act that was sufficient to invoke the doctrine of unclean hands. It could have concluded that Feld was acting in good faith to ensure the safety of the animal walk rather than in bad faith to obstruct the activists. We must defer to the trial court's finding on this point since the evidence does not establish *as a matter of law* that Feld was precluded by the doctrine of unclean hands from obtaining injunctive relief.

Bolbol argues that Feld was acting improperly in obstructing her because her right to access the area around the Oakland performance venue was constitutionally protected and protected by federal order. The federal court order did not apply to Feld. The trial

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[10] Bolbol also devotes considerable briefing to the issue of whether Feld had the appropriate permit from the City of Oakland for the August 2012 animal walk. Even if Feld lacked the proper permit for the animal walk, this would not establish "unclean hands" as the type of permit was not connected to Bolbol's unlawful violence. "The misconduct must '"' prejudicially affect the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief.'"' [Citation.]" (*Kendall-Jackson, supra*, 76 Cal.App.4th at p. 979.) Bolbol's rights were not impacted by the nature of the permit that Feld obtained for the animal walk. We note in particular that the basis for the WVRO was not Bolbol's failure to obey Feld employees' instructions that she remain outside the rope lines, but her unlawful violence against two Feld employees.

court found that Feld's minor intrusions on Bolbol's access to the public street, sidewalks, and walkways did not constitute unlawful activity and did not preclude Feld from obtaining injunctive relief. As there is substantial evidence supporting the trial court's findings, we must uphold them.

Bolbol also urges that Feld could not seek or obtain an injunction against her because it would necessarily interfere with her First Amendment rights. Of course, a WVRO may not be obtained to prohibit constitutionally protected speech or other constitutionally protected activities. (§ 527.8, subd. (c).) However, "if the elements of section 527.8 are met by the expression of a credible threat of violence toward an employee, then that speech is not constitutionally protected and an injunction is appropriate. The relevant question for this court is whether the [employer] proved the elements of the statute. If so, reliance on the First Amendment will be unavailing." (*City of San Jose v. Garbett*, *supra*, 190 Cal.App.4th at p. 537.) Here, Bolbol engaged in actual violence toward Feld's employees. The injunction was sought to prevent further unlawful violence, which clearly is not constitutionally protected activity. Her attempt to rely on the First Amendment is necessarily unavailing.

D. Great or Irreparable Harm Due To Likelihood of Future Violence

Bolbol asserts that Feld failed to establish that Feld employees would be subjected to great or irreparable harm in the absence of a restraining order because there was a likelihood of future violence.

To obtain a permanent WVRO, Feld was required to show that "great or irreparable harm would result to an employee without issuance of the prohibitory injunction because of the reasonable probability the wrongful acts will be repeated in the future." (*Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 331.) Bolbol's attorney argued below that there was no need for a restraining order because Bolbol had never used violence before or since the August 7, 2012 event. The court found that there was a

reasonable probability of future violence by Bolbol. "[A]s long as this rope line remains in dispute, it is clear from Ms. Bolbol's actions in the video, what she said when she testified and what she said on the videotape, that she believes that she is entitled to keep going under the rope and to push against that rope and to push against the employees. And the Court finds, as a result, that there is a significant risk; as long as this rope issue is in dispute, that there is a reasonable probability of similar incidents occurring in the future."

We review the trial court's finding for substantial evidence. The videos of the August 7, 2012 animal walk illustrate the physically aggressive stance that Bolbol took toward Feld employees. While her unlawful violence against Voigt and Neves is not shown on the videos, she can be seen appearing to shove a male Feld employee who is blocking her way and going under the rope lines that Feld employees are trying to maintain around the animals. At the same time, she can be heard issuing a torrent of verbal abuse that appears to be intended to provoke Feld's employees. This evidence was sufficient to support a finding that she was likely to engage in unlawful violence in the future in the absence of a restraining order.[11] The fact that Bolbol had not previously engaged in unlawful violence against Feld employees did not mean that there was not a likelihood of future violence. A reasonable inference could be drawn from the videos and other evidence before the trial court that Bolbol's anger against Feld employees had escalated. The fact that she had not engaged in unlawful violence *after* the August 7, 2012 animal walk was of little import since a temporary WVRO took effect a week after that animal walk. The trial court could have reasonably concluded that, absent

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[11] Although Bolbol makes a separately headed argument that Feld failed to show "great or irreparable harm," we do not understand her to be claiming that unlawful violence against a Feld employee would not result in great or irreparable harm. She provides no authority for the proposition that subjecting a person to unlawful violence does not subject that person to great or irreparable harm. If she is making such an argument, we reject it as unsupported by any reasoned argument.

a WVRO, Bolbol's anger at Feld's employees was likely to result in unlawful violence in the future.

E. Denial of New Trial Motion Based On New Evidence

Bolbol contends that the trial court erred in denying her new trial motion because the new video obtained after the September 2012 hearing "shows that Ms. Bolbol did not commit violence . . . ."

On October 22, 2012, Bolbol sought a continuance on the ground that she had just received a video that Feld had been "compelled to disclose" by a federal court in a federal action, which was "its entire video of the Animal Walk conducted on August 7, 2012." She asserted that this "new evidence" "refutes Feld's characterization of Ms. Bolbol's conduct . . . ." Bolbol also filed a motion for a new trial based on the newly disclosed Feld video. The court viewed the new trial motion as a motion "to reopen the evidence." In April 2013, after the court had "reviewed the videos" that Bolbol had provided in support of her motion, it denied Bolbol's motion.[12]

We have already addressed Bolbol's claim that the belatedly disclosed Feld videos established that she had not committed unlawful violence. The videos did not so demonstrate. The trial court reviewed all of the videos and concluded that the belatedly disclosed Feld videos did not have the potential to change its decision that Bolbol had

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[12] At the end of the September 17, 2012 hearing, the court explained that it was unable to view the videos except on the parties' equipment in the courtroom. At the January 2013 hearing, the court told the parties that "I did look at the DVD . . . but . . . it was a very cursory look. I mean, quite frankly, I was fast forwarding through it just to see, you know, what was even being covered. I didn't really look at it so what I'm going to do is take this under submission and I'm going to review . . . that video and the other videos which have been submitted." "[I]f the court feels that it does shed some light that would change, potentially change the Court's ruling in this case, the Court would be inclined to reopen the hearing." The court explained that it had "needed a little help" to view the videos but "that got taken care of."

committed unlawful violence. Since the court actually watched these videos and determined that they made no difference to its decision, there is no merit to Bolbol's claim that the court erred in failing to consider these videos or in denying her new trial motion.

F. Overbreadth Claim

Bolbol asserts that the WVRO was unconstitutionally overbroad.

The trial court pointed out that "[y]ou don't have a right to hit people in the exercise of free speech." "Physical violence is not protected." Bolbol's attorney agreed with the trial court that the only part of the restraining order that potentially inhibited Bolbol's free speech was the stay away order that required her to be two yards away from Feld's employees. The court found that the injunction was not unconstitutionally overbroad because Bolbol was "not denied access to Feld events, to leaflet at those events, to film those events, or to educate the public about those events."

Bolbol cites no authority for her claim that a WVRO is invalid where it contains a narrowly tailored stay away order. Of course a WVRO may not "*prohibit*[] speech or other activities that are constitutionally protected, or otherwise protected by Section 527.3 or any other provision of law." (§ 527.8, subd. (c), italics added.) Nevertheless, section 527.8 explicitly provides that a WVRO may "enjoin[] a party from . . . coming within a specified distance of, or disturbing the peace of, the employee." (§ 527.8, subd. (b)(6)(A).) "The overbreadth doctrine provides that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which *sweep unnecessarily broadly* and thereby invade the area of protected freedoms.'" (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 577, italics added.) The question is "whether the challenged provisions of the injunction burden *no more speech than necessary* to serve a significant government interest." (*Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 765, italics added.) Here, the trial court

reasonably concluded that the two-yard stay away order was not *unnecessarily* broad. While this stay away order may have *some impact* on Bolbol's constitutionally protected speech and related activities with regard to Feld, that impact is the minimum *necessary* to protect Feld's employees from the risk of future unlawful violence perpetrated by Bolbol. The injunction is not constitutionally overbroad.

V. Denial of Motion To Strike

Bolbol, Cuviello, and Andersen challenge the trial court's denial of their motion to strike the petition under section 425.16.

A. Background

At the commencement of the September 6, 2012 hearing, the defense asked the court to dismiss Feld's action under section 425.16. At that point, the court had heard all of Feld's evidence other than its expert. The court took the request under submission pending the filing of "written papers." Appellants filed their motion to strike on September 12, 2012. They asserted that their acts had been undertaken in pursuit of their free speech rights and that Feld could not demonstrate a probability of prevailing on its petition. The motion to strike was based on the evidence presented at the September 2012 hearing.

Feld's December 2012 opposition to the motion to strike asserted that the "revised" motion to strike filed in November 2012 was an implied withdrawal of the original motion to strike and was untimely so there was no valid motion to strike before the court. Feld also claimed that the motion did not establish that its action came within the scope of section 425.16, and it argued that it had established a probability of prevailing. Appellants responded that their amended motion was not a withdrawal of their original motion but merely a revision to take into account the new video disclosed

by Feld. They noted that the court had discretion to permit the revision and urged that the new video provided "a sufficient reason" for the revision.

The court rejected Feld's challenge to the timeliness of the motion by "exercis[ing] its discretion to consider the Motion to Strike." It found that "the actions which [Feld] sought to enjoin were not acts in furtherance of [appellants'] right of free speech or petition under the United States o[r] California Constitution in connection with a public issue. The conduct [Feld] sought to enjoin was actual or threatened violence, not protected speech or actions." The court also found that Feld had made "a prima facie showing" in support of its petition even though Feld ultimately did not succeed on its petition as to Cuviello and Andersen.

B. Analysis

"[W]orkplace violence petitions in general, like civil harassment petitions, are subject to motions to strike under section 425.16." (*City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 617.) "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

"'Section 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] 'Only a cause of

action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278-279 (*Soukup*).)

"To establish a probability of prevailing, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] For purposes of this inquiry, 'the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' [Citation.] In making this assessment it is 'the court's responsibility . . . to accept as true the evidence favorable to the plaintiff . . . .' [Citation.] The plaintiff need only establish that his or her claim has 'minimal merit'. . . ." (*Soukup, supra*, 39 Cal.4th at p. 291.) Our standard of review is de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

We assume for the sake of argument that appellants made a threshold showing that Feld's petition arose from their exercise of their free speech rights and proceed to the question of whether Feld demonstrated a probability of prevailing. Since the parties agreed that the motion would be determined based on the evidence presented at the September 2012 hearing, we look to that evidence to see whether, accepting Feld's evidence as true, Feld made a prima facie case in support of its petition.

1. Bolbol

We have no difficulty concluding that Feld met its burden as to Bolbol. By succeeding on its petition against Bolbol, Feld necessarily made out a prima facie case as to her. The granting of injunctive relief cannot "be viewed as anything other than a

judicial finding that the petitioner has proved a likelihood of prevailing on the claim." (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 664.) The arguments that Bolbol makes to the contrary are essentially the same ones she made as to the injunction. As we have already addressed those arguments, we need not repeat our analysis here.

2. Andersen

Stuart testified that Andersen hit him in the back during the animal walk. He denied that he had stepped on her toe or pushed her into a fence. Bailey testified that he saw Andersen hit Stuart in the back. Del Moral testified that he saw Andersen push or shove Neves and Voigt. Andersen testified that Stuart tried to block her way, stepped on her foot, and used his hip to push her into a fence. She admitted that she hit Stuart, but she claimed she did so to get him off of her foot.

The court denied Feld's petition as to Andersen because it found that, although Andersen had hit Stuart in the back when he was "blocking her way," this act was not an "act of violence" because Stuart "did bump into her" and "was stepping on her foot." "Her response was instinctive and does not form the basis for the issuance of an injunction." The court found that Feld was not entitled to an injunction based on testimony about Andersen pushing Neves and Voigt because this incident "was not well fleshed out" and may have been "in response to normal jostling of the crowd." Thus, based on its credibility determinations and its weighing of the strength of the evidence, the court concluded that Andersen had not committed unlawful violence.

As *the factfinder* ruling on *the merits* of Feld's petition, the court was entitled to make credibility and weight-of-the-evidence decisions that discredited some of Feld's evidence. However, in making a *legal* ruling on appellants' *motion*, the court was not authorized to discredit Feld's evidence by "'weigh[ing] the credibility or comparative probative strength of competing evidence.'" (*Soukup*, *supra*, 39 Cal.4th at p. 291, italics added.) The court was required "'to accept as true the evidence favorable to'" Feld, and

Feld's burden on the motion was merely to show that its petition "has 'minimal merit'. . . ." (*Ibid.*)

The trial court did not err in denying the motion as to Andersen. Feld produced evidence in support of its petition that Andersen hit Stuart without provocation and pushed or shoved Neves and Voigt. If this evidence was taken as true, as the court was required to do in ruling on appellants' motion, it satisfied Feld's burden of showing that its petition had the requisite minimal merit. This evidence reflected that Andersen had used unlawful violence against three Feld employees, and, because there were multiple acts, supported an inference that such violence was likely to recur. While this evidence did not ultimately prevail when subjected to credibility and weight assessments, it was sufficient to satisfy Feld's burden of making out a prima facie case in opposition to appellants' motion.

3. Cuviello

Neves testified that she saw Cuviello push Higinio. Voigt testified that she saw Cuviello hit Higinio repeatedly with his camera. Bailey testified that Cuviello hit Higinio and Del Moral with his camera on a stick. Del Moral testified that he saw Cuviello trying to film over Higinio's head and "hitting him on the side and shoulder" with his camera pole.

Cuviello testified that he had never used violence against any Feld employees, but Feld employees had continually harassed him and assaulted him with ropes. He had pushed the rope off of him during the August 7, 2012 animal walk when Higinio was holding it against him, but he had not hit Higinio. Cuviello testified that he had not hit anyone with his camera because he would not want to risk damaging his expensive camera. Cuviello was filming an interaction between Del Moral and Bolbol when Del Moral "slammed right into" Cuviello. Cuviello then pushed Del Moral off of him.

In ruling on the merits of Feld's petition as to Cuviello, the court decided that the evidence as to Cuviello's acts was conflicting and not "clear and convincing" regarding

the "Henry" (Higinio) incident. It also chose to credit Cuviello's "convincing" testimony with regard to the Del Moral incident. However, in ruling on appellants' motion, the court was not entitled to make credibility assessments. It was required to accept Feld's evidence as true. Feld produced evidence that Cuviello had repeatedly hit one Feld employee and hit or shoved another. Since, in ruling on the motion, the court was required to credit this evidence, it was obligated to find that Feld had established that its petition had minimal merit as to Cuviello. Evidence that he had assaulted multiple Feld employees repeatedly could have supported a finding of unlawful violence and likelihood of recurrence. Hence, Feld met its burden of making out a prima facie case in opposition to the motion. The court did not err in denying the motion as to Cuviello.

VI. Disposition

The order is affirmed. In the interests of justice, the parties shall bear their own appellate costs.

_____
Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Grover, J.